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No. 87-____

In the Supreme Court of the United States

OCTOBER TERM, 1987

REINALDO ORELLANES
A/K/A REINALDO ORELLANE,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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April 1988

QUESTION PRESENTED

Section 101(5) of Public Law 99-308 (Firearm Owners' Protection Act of 1986) reversed this Court's determination, in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), that a state court plea of guilty, followed by a withholding of adjudication, was a "conviction" for the purposes of federal gun control laws. P.L. No. 99-308 negated *Dickerson* by requiring the federal courts to determine whether a "conviction" occurred by examining the law of the jurisdiction in which the predicate proceedings took place. Approximately 29,000 persons have felony adjudications "withheld" in Florida each year; as do countless others in the other states which follow this practice. The question presented in this case is:

Whether a "withheld adjudication" under Florida Statute § 948.01, which carries with it none of the stigma of an adjudication of guilt, can form the predicate "conviction" for a "crime punishable by imprisonment for a term exceeding one year," under federal gun control statutes when viewed in the light of § 101(5) of P.L. No. 99-308.

THE PARTIES

The parties are petitioner, Reinaldo Orellanes (a/k/a Reinaldo Orellane), and the United States of America, as set forth in the caption of the case.

TABLE OF CONTENTS

QUESTION PRESENTED i

THE PARTIES i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Summary of Pertinent Facts 4

B. Proceedings Below 5

REASONS FOR GRANTING THE WRIT 6

A. The Court of Appeals Opinion' Adversely Affects Roughly 400,000 Persons who have Received Withheld Adjudications in Florida. 6

B. The Supreme Court Should Certify the Foregoing Question to the Supreme Court of Florida, in Light of the Impact of the Court of Appeals' Decision on Roughly 400,000 People who have Received Withheld Adjudications in Florida. 13

V. CONCLUSION 13

APPENDIX: *United States v. Orellanes* 15

TABLE OF AUTHORITIES

CASES

Accredited Surety & Casualty Co. v. State, 318 So.2d 554 (Fla. App. 1975).....12

Barber v. State, 413 So.2d 482 (Fla. App. 1982).....13

Bateh v. State, 101 So.2d 869 (Fla. App. 1958), *cert. dismissed*, 110 So.2d 7 (Fla. 1959), *cert. denied*, 361 U.S. 826 (1959) 8

Delaney v. State, 190 So.2d 578, 580 (Fla. 1966), *appeal dismissed*, 387 U.S. 426 (1966) 8

Delta Truck Brothers v. King, 142 So.2d 273 (Fla. 1962).....12

Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983) 9

Ellis v. State, 129 So. 106 (Fla. 1930) 10, 12

Finch v. Mayo, 137 Fla. 762, 189 So. 27 (Fla. 1939) 10

Helton v. State, 106 So.2d 79 (Fla. 1958).....8

Holland v. Florida Real Estate Commission, 352 So.2d 914 (Fla. App. 1977).....12

Smith v. State, 78 So. 530 (Fla. 1918) 12

State ex rel Spitzer v. Mayo, 129 Fla. 426, 176 So. 434 (Fla. 1937) 10

State v. Gazda, 257 So.2d 242 (Fla. 1971) (prior history *Gazda v. State*, 244 So.2d 454 (Fla. 1st DCA 1971) 9, 10, 11

Timmons v. State, 119 So. 393 (Fla. 1929).....12

United States v. Bruscantini, 761 F.2d 640 (11th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 271 (1985).....9

United States v. Garcia, 727 F.2d 1028 (11th Cir. 1984).....9

Weathers v. State, 56 So.2d 536 (Fla. 1952), *cert. denied*, 344 U.S. 896 (1952) 12

Wooten v. State, 332 So.2d 15 (Fla. 1976).....12

UNITED STATES STATUTES

18 U.S.C. § 922(h)(1).....5, 6

18 U.S.C. § 924(a) 5, 6

18 U.S.C. §§ 922 and 924.....9, 10

18 U.S.C. § 921 (a)(20).....6, 9, 14

PUBLIC LAWS

Pub.L. No. 99-308.....*passim*

FLORIDA STATUTES AND CONSTITUTION

F.S. § 775.14.....10, 11

F.S. § 948.01.....5, 6, 7, 8, 10, 12

Art. V, § 3(b)(6), Fla. Constitution 13

FEDERAL RULES OF PROCEDURE

Fed. R. Crim. P. 11(a)(2).....6

FLORIDA RULES OF PROCEDURE

Fla. R. App. P. 9.150 13

In the Supreme Court of the United States

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No. 87-___

REINALDO ORELLANES
A/K/A REINALDO ORELLANE,
PETITIONER,

V.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The prior opinion most pertinent to this Petition is the February 17, 1987, opinion of the United States Court of Appeals, 809 F.2d 1526 (11th Cir. 1987), *rehearing and rehearing en banc denied*, Jan. 12, 1988, ___ F.2d ___ (11th Cir. 1988). The opinion, judgment, and the order denying rehearing are reproduced in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered February 17, 1987 (Appendix), affirming petitioner's conviction dated March 14, 1986. The order denying petitioner's motion for rehearing and suggestion of rehearing *en banc* was entered January 12, 1988. The time for filing this petition would have expired on March 12, 1988, absent an extension. An Application for Extension of Time in which to file this Petition was filed on March 12, 1988, and the extension was granted on March 15, 1988 (Kennedy, J.). The Extension of time runs to and includes April 11, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1) and Supreme Court Rule 20.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the following federal statutes:

Title 18 U.S.C. § 921 (20) (1986):

(a) As used in this chapter --

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include --

. . . .

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Title 18 U.S.C. § 922 (h)(1) (1968):[1]

(h) It shall be unlawful for any person --

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . .

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18 U.S.C. § 924 (a) (1968):

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

This Petition involves the following Florida statute:

§ 948.01 (1) Any court of the state having original jurisdiction of criminal actions may at a time to be determined by the court, either with or without an adjudication of the guilt of the defendant, hear and determine the question of the probation of a defendant in a criminal case, except for an

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[1] § 922 (h) (1968) was recodified in 1986 at 18 U.S.C. § 922 (g), and the prohibition against persons "under indictment" was removed from subsection (1). In addition the prohibition against "possession," formerly in 18 U.S.C § 1202, was transferred to this subsection.

offense punishable by death, who has been found guilty by the verdict of a jury, has entered a plea of guilty or a plea of nolo contendere, or has been found guilty by the court trying the case without a jury.

. . . .

(3) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place him on probation. . . .

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STATEMENT OF THE CASE

A. Summary of Pertinent Facts

The case was submitted to the Court of Appeals on a stipulated statement of facts, and the Court of Appeals' opinion accurately reflects the facts, as follows.

On July 28, 1981, Reinaldo Orellanes, the petitioner herein, entered a negotiated plea of guilty of two felonies, possession of marijuana and carrying a concealed firearm, in the Circuit Court of the Eleventh Judicial Circuit of Florida. The Florida court entered an order withholding adjudication pursuant to Florida Statute § 948.01. Orellanes' lawyer in the state court proceeding did not advise Orellanes of potential collateral consequences that could result from his guilty plea.

After entry of the plea, Orellanes purchased firearms and ammunition at Tamiami Gun Shop in Miami, Florida, on January 6, and December 12, 1982; on January 3, 16, and 17, 1984; and on September 16, 1985. On each of the above purchases, Orellanes filled out the required Bureau of Alcohol, Tobacco, and Firearms, United States Treasury Department ("BATF"), form stating that he had never been convicted of a crime punishable by more than one year imprisonment. The BATF forms provided the government with the information with which it obtained a ten-count indictment against Orellanes.

On October 29, 1985, the grand jury returned an indictment charging Orellanes with eight counts of receipt of a firearm by a convicted felon in violation of 18 U.S.C. § 922(h)(1) and 18 U.S.C. § 924(a), one count of receipt of ammunition by a convicted felon in violation of the same sections of Title 18, and one count of possession of a controlled substance.

B. Proceedings Below

Orellanes filed two motions to dismiss the first nine counts of the indictment. The district court rejected Orellanes' contention that the Florida court's withholding of adjudication prevented a subsequent conviction under 18 U.S.C. § 922(h)(1) and denied both motions. The parties entered into a conditional plea agreement, pursuant to Federal Rule of Criminal Procedure 11(a)(2), to permit appellate review of the denial of Orellanes's pretrial motions. The plea agreement was based upon a stipulated statement of facts and the seven counts pleaded to were the alleged violations of 18 U.S.C. §§ 922(h)(1) and 924(a).

The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's conviction after determining that Orellanes was a "convicted felon" under Florida law, and that his

Florida withheld adjudication formed the predicate "conviction" for prosecution under federal gun control laws.

REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS OPINION' ADVERSELY AFFECTS ROUGHLY 400,000 PERSONS WHO HAVE RECEIVED WITHHELD ADJUDICATIONS IN FLORIDA.

The Court of Appeals' decision holds, without using all of the words of 18 U.S.C. § 921 (a)(20), that a plea of guilty and a withholding of adjudication pursuant to § 948.01, F.S., constitutes "conviction of a crime punishable by imprisonment for a term exceeding one year" under Florida law.[2] The Court of Appeals' decision adversely affects roughly 400,000 persons who have received withheld felony adjudications in Florida since 1959.[3]

Withholding adjudication is a vital part of Florida's criminal justice system. One of every five felony cases is disposed of by a guilty or nolo plea and a "withhold," and to construe Florida withheld adjudications as convictions could severely undermine that system. This result requires that the Supreme Court review the Court of Appeals' decision, and is so important that it calls for certification of the question to the Supreme Court of Florida.

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[2] The Court of Appeals' opinion stops short of 18 U.S.C. § 921 (a)(20), by merely holding that Orellanes was "convicted" under Florida law, not that he could have been sentenced to imprisonment for a term exceeding one year.

[3] As will become apparent below, some of these people are undoubtedly dead.

For the eight years 1978-1985, nineteen percent (19%) of all Florida Circuit Court (Criminal)[4] dispositions, or 191,694 out of 1,023,286 dispositions, were by plea of guilty (or nolo contendere) and withholding adjudication.[5] Applying the 1978-85 percentage to the 155,447 criminal dispositions in 1986,[6] roughly 29,120 additional Florida criminal defendants had adjudications withheld in 1986. Presuming that approximately the same number of adjudications were withheld in 1987 as in the 1982-85 period, on the average, at least another 28,000 adjudications were withheld in 1987. For the years before 1978, assuming a linear increase in withheld adjudications from 0 in 1958 (the year before the Florida legislature enacted F.S. § 948.01), to 15,165 in 1978 (the first year for which data are available), a conservative estimate of the number of persons affected through 1986 is 400,000.

Florida's 1959 withheld adjudication statute was a response to the judicial practice of deferring sentencing "from day

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[4] Circuit Courts have exclusive jurisdiction over felonies, though some of these dispositions may have involved pleas to misdemeanors.

[5] Summary Report System, Office of State Courts Administrator, Tallahassee, FL, annual reports, 1978-84. 1978: 15,165 out of 82,069 total dispositions; 1979: 16,534 of 91,148; 1980: 18,610 of 101,450; 1981: 24,302 of 133,835; 1982: 30,255 of 153,333; 1983: 30,447 of 149,615; 1984: 28,069 of 151,723; 1985: 28,312 of 160,113.

[6] The State Courts Administrator stopped keeping separate records on withheld adjudications with the 1986 report.

to day and term to term."[7] In *Delaney v. State*, 190 So.2d 578, 580 (Fla. 1966), *appeal dismissed*, 387 U.S. 426 (1966), the Florida Supreme Court described the rationale for F.S. § 948.01:

> Prior to the passage, by the 1959 legislature, of the present § 948.01 an accused could be placed on probation, but only after a formal adjudication of guilt. . . . Under the new section the court may place on probation a defendant who has pleaded guilty or nolo contendere, or been found guilty after trial, without first entering a judgment of guilt of [sic][8] conviction.
>
> The obvious purpose of the new procedure was to provide for the rehabilitation of one who had committed a crime *without formally and judicially branding the individual as a convicted criminal* with consequent loss of civil rights and other damning consequences. [Emphasis added.]

The Court of Appeals' opinion is the first application of § 101(5) of Pub.L.No. 99-308 to determine whether Florida withheld adjudications are convictions under Florida law. There are two prior 11th Circuit cases in which this same issue was relevant,[9] but was not reached because of the holding in *Dickerson*

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[7] A practice ended by the Supreme Court of Florida in 1958. *Helton v. State*, 106 So.2d 79 (Fla. 1958), *Bateh v. State*, 101 So.2d 869 (Fla. App. 1958), *cert. dismissed*, 110 So.2d 7 (Fla. 1959), *cert. denied*, 361 U.S. 826 (1959), which produced the need for legislation.

[8] Same in original; probably should be "or."

[9] *United States v. Garcia*, 727 F.2d 1028 (11th Cir. 1984) and *United States v. Bruscantini*, 761 F.2d 640 (11th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 271 (1985).

v. New Banner Institute, Inc.[10] that all state withheld adjudications were "convictions" for purposes of federal law.

The Court of Appeals relied on a single Florida case, *State v. Gazda*, 257 So.2d 242 (Fla. 1971), for the view that Florida withheld adjudications are predicate convictions as defined in 18 U.S.C. § 921 (a)(20). Close examination of *Gazda* shows that it cannot form the basis for the Court of Appeals' conclusion.

The starting place for this analysis is 18 U.S.C. § 921 (a)(20), which requires that a predicate conviction for purposes of 18 U.S.C. § § 922 and 924 must be for a crime "punishable by imprisonment for a term exceeding one year." A person who has entered a guilty plea in Florida cannot be sentenced to even one day of imprisonment until the court enters an adjudication of guilt. In *Gazda*, *supra*, the Florida Supreme Court held:

> It is important to distinguish a "judgment of conviction" which is defective unless it contains an adjudication of guilt.[11] A judgment of conviction is a necessary prerequisite to a valid sentence.[12]

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[10] 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983).

[11] Citing *Ellis v. State*, 129 So. 106, 108 (Fla. 1930), where the Florida Supreme Court held:

> [T]his court is committed to the doctrine that a legal conviction of crime includes a judgment of the court as well as a plea or verdict of guilty.

[12] *State v. Gazda*, 257 So.2d 242, 244 (Fla. 1971), citing *State ex rel Spitzer v. Mayo*, 129 Fla. 426, 176 So. 434 (Fla. 1937); *Finch v. Mayo*, 137 Fla. 762, 189 So. 27 (Fla. 1939).

One flaw in the Court of Appeals' reasoning is the association of the single word "conviction" with the Gun Control Act's predicate crime "punishable by imprisonment for a term exceeding one year." A guilty plea followed by a withholding of adjudication in Florida means that *the defendant cannot be sentenced to even a day of imprisonment.* Thus a mere guilty plea, absent an adjudication of guilt by the court, cannot give rise to a predicate offense envisioned by Congress in 18 U.S.C. § § 922 and 924.

Definition of the term "conviction," confusingly distinguished from a "judgment of conviction" in *Gazda*, did not mean that an accused who plead guilty was "convicted" for all purposes. In *Gazda*, the Florida Supreme Court was simply defining a word in a statute enacted in 1957, two years before F.S. § 948.01 was enacted. The statute being interpreted was F.S. § 775.14, which read:

> Any person receiving a *withheld sentence upon conviction* for a criminal offense, and such withheld sentence has not been altered for a period of five years, shall not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld. [Emphasis added.]

This statute was enacted by the Florida Legislature in 1957 because:[13]

> At the time this statute was enacted trial courts of this state assumed that after a conviction they had the inherent power to withhold indefinitely the sentencing of a defendant "from day to day and term to term." . . . This practice . . . left the defendant in a position of not knowing when his obligation to the State arising out of his conviction

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[13] *Gazda v. State*, 244 So.2d 454, 455 (Fla. App. 1971).

would be satisfied. Presumably F.S. section 775.14 was enacted to abate these problems.

The issue in *Gazda* was whether the trial court could *sentence* Gazda more than five years after his guilty plea was entered, since the trial judge had withheld adjudication and sentencing pending a presentence investigation. Gazda then managed to absent himself from the court's jurisdiction for five years after his plea was entered, effectively preventing his sentencing. The Florida Supreme Court in *Gazda* restricted its analysis of the term "conviction" to its meaning in F.S. § 775.14, as follows:

> [F]or the purposes of construing § 775.14, the term "conviction" means determination of guilt by verdict of the jury or by plea of guilty, ...

The Florida Supreme Court's opinion in *Gazda* does not apply that same definition of "conviction" to any other use of the word in the Florida Statutes. It would rock the judiciary of Florida to learn that the federal courts had so extended the *Gazda* decision, and the Supreme Court of Florida should be given the opportunity to rule on this issue.

The analysis of Florida law in the Court of Appeals opinion is wrong, and appellant urges the Supreme Court to examine Florida's "withheld adjudication" system, with the advice of the Florida Supreme Court. As the following cases amply demonstrate, a guilty plea and withheld adjudication in Florida does not have any of the collateral consequences of a conviction.

A guilty plea and adjudication withheld pursuant to F.S. § 948.01 does not constitute a conviction for the multiple offender provisions of Florida's drunk driving law. *Wooten v. State*, 332 So.2d 15 (Fla. 1976). A guilty plea and withheld adjudication is insufficient to constitute a conviction for suspending a real

estate broker's license. *Holland v. Florida Real Estate Commission*, 352 So.2d 914 (Fla. App. 1977). Conviction under a statute preventing one from engaging in a brokerage business without a license means determination of guilt *and* judgment of court. *Delta Truck Brothers v. King*, 142 So.2d 273 (Fla. 1962). Conviction of a principal means *adjudication* of guilty. *Weathers v. State*, 56 So.2d 536 (Fla. 1952), *cert. denied*, 344 U.S. 896 (1952). A judgment of conviction in a misdemeanor case must contain an *adjudication* of guilty by the court. *Ellis v. State, supra.* When alleging prior convictions in an indictment, the prior convictions must include *adjudication* by the court. *Timmons v. State*, 119 So. 393 (Fla. 1929). A "second offense" of selling liquor in a dry county could not stand because the defendant had previously only plead guilty to a like offense. *Smith v. State*, 78 So. 530 (Fla. 1918). A conviction for purposes of the bail bond statute means *adjudication of guilt and not a guilty plea. Accredited Surety & Casualty Co. v. State*, 318 So.2d 554 (Fla. App. 1975). A witness cannot be impeached by prior convictions if adjudication was withheld in the prior matter. *Barber v. State*, 413 So.2d 482 (Fla. App. 1982).

B. THE SUPREME COURT SHOULD CERTIFY THE FOREGOING QUESTION TO THE SUPREME COURT OF FLORIDA, IN LIGHT OF THE IMPACT OF THE COURT OF APPEALS' DECISION ON ROUGHLY 400,000 PEOPLE WHO HAVE RECEIVED WITHHELD ADJUDICATIONS IN FLORIDA.

Article V, Section 3(b)(6), of the Florida Constitution permits discretionary Supreme Court review of certified questions from the federal Courts of Appeal and the Supreme Court. Rule 9.150 of the Florida Rules of Appellate Procedure permits:

> (a) Upon either its own motion or that of a party, the Supreme Court of the United States or the United States

Court of Appeals may certify a question of law to the Supreme Court of Florida whenever the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida.

The Court of Appeals' opinion does not only affect Mr. Orellanes, but it sweeps in roughly 400,000 other individuals who have plead guilty and received withheld adjudications in Florida. Even if this Court were inclined to deny certification of this question to Orellanes, the interests of so many of those 400,000 persons that are still alive demand that this Court certify the question to the Supreme Court of Florida.

V. CONCLUSION

The Court of Appeals' opinion turns roughly 400,000 people who have received withheld adjudications in Florida into convicted felons for federal gun control law purposes. It does so based upon an inadequate analysis of Florida law, and with no more support than a single errant sentence in a 1971 Florida Supreme Court decision. The Court of Appeals fails to distinguish between the word "conviction" and the definition of the predicate offense in 18 U.S.C. § 921 (a)(20). The Court of Appeals opinion does not explain how a person can be "convicted" of the predicate offense for gun control purposes, which conviction now must be determined according to the law of Florida (§ 101(5) of Pub.L.No. 99-308), and yet not be "convicted" for any purpose under Florida law. Unless the Court of Appeals' decision is reversed, it would take one BATF agent only a few weeks to match up the names of the roughly 400,000 recipients of Florida withheld adjudications with the names on the BATF forms that are required of firearm purchasers, and send tens of thousands of cases to the U.S. Attorneys of Florida for prosecution. This is clearly not in accord

with the intent of Congress when it enacted the Firearm Owners' Protection Act, Pub.L.No. 99-308, in 1986. The Petition for Certiorari should be granted and the relevant question certified to the Florida Supreme Court.

Respectfully submitted this
11th day of April, 1988

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APPENDIX

In The United States Court of Appeals
For The Eleventh Circuit
Case No. 86-5179
UNITED STATES of America,
Plaintiff-Appellee,
v.
Reinaldo ORELLANES, a/k/a Reinaldo Orellana, Defendant-Appellant.
Feb. 17, 1987

Appeal from the United States District Court for the Southern District of Florida

Before KRAVITCH and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

HATCHETT, Circuit Judge:

We affirm the district court's ruling that one who pleads guilty in a Florida state court and has imposition of sentence withheld, may nevertheless be held to have been "convicted" for purposes of applying federal criminal statutes which punish certain conduct following conviction of a felony.

FACTS

On July 28, 1981, Reinaldo Orellanes, the appellant, entered a negotiated plea of guilty of two felonies, possession of marijuana and carrying a concealed firearm, in the Circuit Court of the Eleventh Judicial Circuit of Florida. The Florida court entered an order withholding adjudication pursuant to Florida Statute § 948.01. Orellanes's lawyer in the state court proceeding did not advise Orellanes of potential collateral consequences that could result from his guilty plea.

After entry of the plea, Orellanes purchased firearms and ammunition at Tamiami Gun Shop in Miami, Florida, on January 6, and December 12, 1982; on January 3, 16, and 17, 1984; and on September 16, 1985. On each of the above purchases, Orellanes filled out the required BATF form stating that he had never been convicted of a crime punishable by more than one year imprisonment. The BATF forms provided the government with the information with which it obtained a ten-count indictment against Orellanes.

On October 29, 1985, the grand jury returned an indictment charging Orellanes with eight counts of receipt of a firearm by a convicted felon in violation of 18 U.S.C. § 922(h)(1)[1] and 18 U.S.C. § 924(a)[2], one count of receipt of ammunition by a convicted felon in violation of the same sec-

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[1] Title 18 U.S.C. § 922(h)(1) provides:

(h) It shall be unlawful for any person --

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . .

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

[2] Title 18 U.S.C. § 924(a) provides:

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

tions of Title 18, and one count of possession of a controlled substance.

Orellanes filed two motions to dismiss the first nine counts of the indictment. The district court rejected Orellanes's contention that the Florida court's withholding of adjudication prevented a subsequent conviction under 18 U.S.C. § 922(h)(1) and denied both motions. The parties entered into a conditional plea agreement, pursuant to Federal Rule of Criminal Procedure 11(a)(2), to permit appellate review of the denial of Orellanes's pretrial motions. The plea agreement was based upon a stipulated statement of facts and the seven counts pleaded to were the alleged violations of 18 U.S.C. § § 922(h)(1) and 924(a). The government dismissed counts III, VII, and X.[3]

Orellanes contends that on the effective date of the P.L. No. 99-308, all pending prosecutions not reviewed by the highest courts with authority to review them will abate. He further contends that Florida's withholding of an adjudication of guilt voids a conviction for these federal offenses. Finally, he contends that *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), should not be retroactively applied.

DISCUSSION

Initially, we must decide whether the district court properly held Orellanes a "convicted felon" for purposes of 18 U.S.C. § 922(h)(1). Orellanes asserts that a plea of guilty followed by a withholding of adjudication does not constitute a conviction

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[3] Counts III and VII charged Orellanes with receipt of a firearm by a convicted felon. Count X charged possession of a controlled substance. Six counts of receipt of a firearm and one count of receipt of ammunition by a convicted felon were the seven counts pleaded to by Orellanes.

under Florida law or federal law, and therefore, he cannot be found guilty of violating section 922(h)(1). In *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 112-13, 103 S.Ct. 986, 991 (1983) (citing *Kercheval v. United States*, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927)), the Supreme Court affirmed its earlier considerations of whether a guilty plea was sufficient to constitute a conviction stating that "a plea of guilty . . . is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the Court has nothing to do but give judgment and sentence."

On May 19, 1986, Congress passed Public Law (P.L.) No. 99-308, The Firearms Owners' Protection Act. Section 101(5) of P.L. 99-308 reverses the Supreme Court's decision in Dickerson and

> requires that a 'conviction' must be determined in accordance with the law of the jurisdiction where the underlying proceeding was held. This is intended to accommodate state reforms adopted since 1968, which permit dismissal of charges after a plea and successful completion of a probationary period. . . . Since the federal prohibition is keyed to the state's conviction, state law should govern in these matters.

Senate Report No. 98-583, 98 Cong. 2d Sess. 7 (1984).

We now turn to Florida law, as P.L. 99-308, § 101(5) instructs, in our effort to determine whether Orellanes was properly characterized as a "convicted felon." In *State v. Gazda*, 257 So.2d 242, 243-44 (Fla. 1971), the Florida Supreme Court declared that "the term 'conviction' means determination of guilty by verdict of the jury or by plea of guilty, and does not require adjudication by the court." Consequently, we conclude that the district court correctly held that Orellanes was previously

"convicted" of a crime punishable by imprisonment for a term exceeding one year.

Orellanes claims that Dickerson cannot be retroactively applied to his guilty plea for the state crimes in 1981. Rejecting an identical argument in *United States v. Garcia*, 727 F.2d 1028, 1029 (11th Cir. 1984), this circuit held "[t]he contention that a state procedure for withholding adjudication of a criminal charge will not support a conviction under 18 U.S.C. § 922(h)(1) . . . is foreclosed by [*Dickerson*]. There is no problem of *Dickerson* being applied retroactively . . . . The prevailing law in the former Fifth Circuit prior to *Dickerson* was that state statutes that withheld finality do not prevent convictions within the meaning of section 922."

Orellanes contends that upon the effective date of section 101(5) of P.L. 99-308, his entire prosecution will abate, and he will return to the status of a non-felon. However, the general savings provision of 1 U.S.C. § 109 operates to preserve the penalties of a statute in effect when Orellanes committed the charged offenses.[4] Orellanes's reliance on *Bell v. Maryland*, 378 U.S. 226, 84 S.Ct. 1814, 12 L.Ed.2d 822 (1964), for the proposition that when P.L. 99-308 became law his entire prosecution abated, is erroneous because the Court in *Bell* did not consider, nor apply, the federal general savings clause in 1 U.S.C. § 109 because the case involved the effect of super-

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[4] Title 1 U.S.C. § 109 in pertinent part provides that:

The appeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

vening state and city enactments on convictions for violating a prior state statute.

Since the passage of 1 U.S.C. § 109, "penalties accruing while a statute [is] enforced may be protected after its repeal, unless there is an express provision to the contrary in the repealing statute." *United States v. Jackson*, 468 F.2d 1388, 1390 (8th Cir. 1972), *cert. denied*, 410 U.S. 935, 93 S.Ct. 1391, 35 L.Ed.2d 599 (1973) (quoting *United States v. Brown*, 429 F.2d 566, 568 (5th Cir. 1970)). P.L. 99-308 contains no provision precluding the retention of accruing penalties. We therefore conclude that the district court properly found that no abatement would have occurred on November 15, 1986 -- the effective date of section 101(5) of P.L. 99-308.

We note Orellanes's contention that the supervisory powers of this court should be invoked in order to preserve judicial integrity and provide due process. The exercise of supervisory power is an "extreme sanction which should be infrequently used." *United States v. Pabian*, 704 F.2d 1533, 1536 (11th Cir. 1983). The facts in this case do not indicate a violation of due process and do not warrant the exercise of our supervisory power. Accordingly, we affirm the decision of the district court.

AFFIRMED

United States Court of Appeals
For The Eleventh Circuit

No. 86-5179

D.C. Docket No. 85-00780

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
REINALDO ORELLANES, a/k/a REINALDO ORELLANA, Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before KRAVITCH and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: February 17, 1987
For the Court: Miguel J. Cortez, Clerk
By: Deputy Clerk

ISSUED AS MANDATE: Jan. 25, 1988

In The United States Court of Appeals
For The Eleventh Circuit

Case No. 86-5179

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
REINALDO ORELLANES, a/k/a REINALDO ORELLANA, Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion Feb. 17, 1987, 11 Cir. 1987, 809 F.2d 1526)
January 12, 1988

Before KRAVITCH and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

HATCHETT, Circuit Judge

Supreme Court, U.S.
FILED
JUN 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1691

In the Supreme Court of the United States

OCTOBER TERM, 1987

REINALDO ORELLANES, aka REINALDO ORELLANE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's convictions under 18 U.S.C. (1982 ed.) 922(h)(1) for possessing firearms and ammunition should be reversed in light of the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Dickerson v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983) 3, 4, 5
Flippins v. *United States*, 808 F.2d 16 (6th Cir. 1987), cert. denied, No. 86-6656 (May 18, 1987) 5
Huddleston v. *Dwyer*, 322 U.S. 232 (1944) 5
State v. *Gazda*, 257 So. 2d 242 (Fla. 1971) 3, 5
United States v. *Breier*, 813 F.2d 212 (9th Cir. 1987), cert. denied, No. 87-986 (Mar. 21, 1988) 4, 5
United States v. *Carter*, 801 F.2d 78 (2d Cir.), cert. denied, 479 U.S. 1012 (1986) 4
United States v. *Garcia*, 727 F.2d 1028 (11th Cir. 1984) .. 4
United States v. *Jackson*, 824 F.2d 21 (D.C. Cir.1987), cert. denied, No. 87-5667 (Jan. 11, 1988)..... 4
United States v. *Mechem*, 509 F.2d 1193 (10th Cir. 1975) 5
United States v. *Pennon*, 816 F.2d 527 (10th Cir. 1987), cert. denied, No. 87-5388 (Dec. 14, 1987) 5

Statutes:

Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 ..... 3, 4
§ 110(a), 100 Stat. 460 5
1 U.S.C. 109 5
18 U.S.C. (Supp. IV) 921(a)(20) 3
18 U.S.C. (1982 ed.) 922(h)(1) 2, 3, 4, 5
Fla. Stat. Ann. § 948.01 (West Supp. 1988) 2

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1691

REINALDO ORELLANES, aka REINALDO ORELLANE,
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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-20) is reported at 809 F.2d 1526.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on February 17, 1987. A petition for rehearing was denied on January 12, 1988 (Pet. App. 22). On March 15, 1988, Justice Kennedy extended the time for filing a petition for a writ of certiorari to April 11, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional plea of guilty in the United States District Court for the Southern District of Florida,

petitioner was convicted on six counts of receipt of a firearm by a previously convicted felon and on one count of receipt of ammunition by a previously convicted felon, all in violation of 18 U.S.C. (1982 ed.) 922(h)(1). Petitioner was sentenced to six months at a community treatment center, to be followed by four years' probation. Pet. App. 17.

1. On July 28, 1981, petitioner pleaded guilty in a state court in Florida to the felonies of possessing marijuana and carrying a concealed firearm. The Florida court, acting under a state law (Fla. Stat. Ann. § 948.01 (West Supp. 1988)),[1] placed petitioner on probation for 18 months but did not enter a formal judgment of conviction. Later, on six separate occasions, petitioner purchased firearms and ammunition at a gun shop in Miami, Florida. Pet. App. 15-16.

On October 29, 1985, a federal grand jury returned an indictment charging petitioner with eight counts of receipt of a firearm by a previously convicted felon and one count of receipt of ammunition by a previously convicted felon, in violation of 18 U.S.C. (1982 ed.) 922(h)(1). The indictment also charged petitioner with one count of possession

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[1] Section 948.01 provides in pertinent part:

* * * * *

> (3) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place him upon probation.

* * * * *

of a controlled substance. Petitioner moved the district court to dismiss the firearms charges on the ground that his guilty pleas in the Florida state court were not convictions for the purpose of 18 U.S.C. (1982 ed.) 922(h)(1). The district court denied the motion. Petitioner then pleaded guilty to seven counts of violating the firearms statute, and the government dismissed the remaining counts. Pet. App. 17.

2. The court of appeals affirmed (Pet. App. 15-20). Petitioner argued on appeal that his convictions should abate in light of the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986 Act), which became effective while the appeal in this case was pending. That Act amended the federal firearms statute by providing that "[w]hat constitutes a conviction [for purposes of the statute] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held" (18 U.S.C. (Supp. IV) 921(a)(20)). Previously, this Court had held in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), that "[w]hether one has been 'convicted' within the language of the gun control statutes is necessarily * * * a question of federal, not state, law * * *" (*id.* at 111-112), and that a plea of guilty, followed by a sentence of probation, is a conviction even though a formal judgment is not entered (*id.* at 114). Petitioner argued that his guilty pleas in state court were not convictions under Florida law and, therefore, that the 1986 Act should abate his prosecution for violating 18 U.S.C. (1982 ed.) 922(h)(1).

The court of appeals rejected petitioner's contention for two independent reasons. First, relying on *State* v. *Gazda*, 257 So. 2d 242, 243-244 (Fla. 1971), the court held (Pet. App. 18-19) that a guilty plea constitutes a conviction under Florida law even though formal adjudication is withheld. Second, the court of appeals ruled (*id.* at 19-20)

that the 1986 amendment to the federal firearms statute does not require reversal of petitioner's convictions, even if his guilty pleas were not convictions under Florida law, because the 1986 Act does not apply retroactively.

ARGUMENT

The judgment of the court of appeals is correct. In *Dickerson* v. *New Banner Institute, Inc., supra*, this Court held (460 U.S. at 114) that a plea of guilty in a state court, followed by a sentence of probation, constitutes a conviction within the meaning of 18 U.S.C. (1982 ed.) 922(h)(1), even if a formal judgment of conviction is not entered. Thus, it is clear that, at the time petitioner possessed firearms and ammunition, his conduct violated the federal firearms statute. See *United States* v. *Garcia*, 727 F.2d 1028, 1029 (11th Cir. 1984). Petitioner does not dispute that point.

In 1986, Congress amended the federal firearms statute by enacting the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449, which provides that the meaning of "conviction" under the federal statute must be determined by reference to state law. But that amendment did not take effect until after petitioner's convictions in this case. See Pet. App. 20. Thus, the only issue in this case is whether Congress intended the 1986 Act to apply retroactively. And the answer to that question is plainly "no." See *United States* v. *Carter*, 801 F.2d 78, 83 (2d Cir.) ("retrospectivity is plainly contrary to Congress's intent"), cert. denied, 479 U.S. 1012 (1986); see also *United States* v. *Jackson*, 824 F.2d 21, 22-23 & n.2 (D.C. Cir. 1987), cert. denied, No. 87-5667 (Jan. 11, 1988); *United States* v. *Breier*, 813 F.2d 212, 215 (9th Cir. 1987), cert. denied, No. 87-986 (Mar. 21, 1988).

The general federal saving statute—1 U.S.C. 109—provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any * * * liability" under that statute "unless the repealing Act shall so expressly provide." The saving statute applies to statutory amendments as well as to repeals. See *United States* v. *Breier*, 813 F.2d at 215; *United States* v. *Mechem*, 509 F.2d 1193, 1194 n.3 (10th Cir. 1975) (per curiam). The saving statute creates a presumption in favor of nonretroactivity, and there is nothing in the Firearms Owners' Protection Act to rebut that presumption. On the contrary, the 1986 Act provided that its amendments became effective 180 days after enactment. See § 110(a), 100 Stat. 460. Thus, the courts of appeals have uniformly applied 18 U.S.C. (1982 ed.) 922(h)(1), as interpreted by this Court in *Dickerson*, to offenses committed before the effective date of the 1986 amendment. See *United States* v. *Pennon*, 816 F.2d 527, 529 (10th Cir. 1987), cert. denied, No. 87-5388 (Dec. 14, 1987); *Flippins* v. *United States*, 808 F.2d 16, 18-19 (6th Cir. 1987), cert. denied, No. 86-6656 (May 18, 1987). Accordingly, the court of appeals correctly affirmed petitioner's convictions.[2]

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[2] The court of appeals did not need to reach the question of Florida law presented in the petition—*i.e.*, whether petitioner's guilty pleas in state court, followed by a sentence of probation, are convictions under Florida law. Nevertheless, there is ample support for the court of appeals' interpretation of Florida law. See *State* v. *Gazda*, 257 So. 2d 242, 243-244 (Fla. 1971) ("the term 'conviction' means determination of guilt by verdict of the jury or by plea of guilty, and does not require adjudication by the court"). Of course, this Court generally does "not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1988

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